

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In re Request of	)	
	)	
<b>Frank J. Neely</b>	)	Facility I.D. No. 166080
	)	NAL/Acct. No. MB200641410067
For Waiver of Auction No. 62	)	FRN: 0008498685
Form 301 Filing Deadline	)	File No. BNPH-20060324AFR
	)	
Application for construction permit for New FM station, Due West, South Carolina		

**MEMORANDUM OPINION AND ORDER  
AND  
NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: July 19, 2006**

**Released: July 21, 2006**

By the Chief, Media Bureau:

**I. INTRODUCTION**

1. The Commission has before it the March 24, 2006, request of Frank J. Neely (“Neely”), for waiver of the post-auction Form 301 “long form” application filing deadline. In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture (“NAL”)* issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the “Act”), and Section 1.80 of the Commission’s Rules (the “Rules”),<sup>1</sup> by the Chief, Media Bureau by authority delegated under Section 0.283 of the Rules,<sup>2</sup> we find that Neely apparently willfully violated Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules by failing to timely file a post-auction Form 301 application.<sup>3</sup> Based upon our review of the facts and circumstances before us, we conclude that Neely is apparently liable for a monetary forfeiture in the amount of three thousand dollars (\$3,000). We also grant Neely’s waiver request and accept his application for filing.

**II. BACKGROUND**

2. On April 14, 2005, the Media Bureau and the Wireless Telecommunications Bureau (collectively, the “Bureaus”) jointly released a Public Notice announcing a November 1, 2005, auction of FM broadcast construction permits, Auction No. 62.<sup>4</sup> On September 21, 2005, the auction was postponed until January 12, 2006, to provide additional time in the aftermath of Hurricane Katrina.<sup>5</sup> Neely timely filed a FCC Form 175 application to participate in FM Auction No. 62, and was found to be a qualified

<sup>1</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

<sup>2</sup> See 47 C.F.R. § 0.283.

<sup>3</sup> See 47 C.F.R. §§ 73.3573(f)(5)(i), 73.5005(a).

<sup>4</sup> *Auction of FM Broadcast Construction Permits Scheduled for November 1, 2005*, Public Notice, 20 FCC Rcd 1999 (MB/WTB 2005).

<sup>5</sup> *FM Broadcast Auction Start Date Rescheduled for January 12, 2006*, Public Notice, 20 FCC Rcd 14720 (MB/WTB 2005).

bidder.<sup>6</sup> By a February 8, 2006, Public Notice, the Bureaus announced that Neely was the winning bidder in FM Auction No. 62 for the FM construction permit in Due West, South Carolina.<sup>7</sup> Winning bidders were to file a post-auction FCC Form 301 “long form” application by March 10, 2006. The *Auction No. 62 Closing Public Notice* cautioned that “[a]n applicant that fails to submit the required long form application before the specified deadline, and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and shall be subject to the payments set forth in Section 1.2104(g) of the Commission’s rules.”<sup>8</sup> Neely failed to timely submit a post-auction Form 301 application. His Form 301 application was submitted on March 24, 2006, along with a request for a waiver of the filing deadline, as set forth in Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules, and the *Auction No. 62 Closing Public Notice*.<sup>9</sup> Neely subsequently supplemented the request for waiver on May 18, 2006.

3. In his request for waiver, Neely states he did not have the assistance of counsel during the auction process and that he neglected to fully read the February 8, 2006, *Auction No. 62 Closing Public Notice*. Neely asserts that, upon discovering that he needed to file a post-auction Form 301 application, he immediately retained counsel to assist in filing the Form 301 application using the appropriate procedures in CDBS for a late filing. Neely contends that a grant of a waiver of the filing deadline is in the public interest because (1) he has complied with all other requirements with respect to his auction application and auction participation in a timely manner; (2) acceptance of the late Form 301 will not harm or prejudice any other party; and (3) acceptance of the late Form 301 will greatly hasten the inception of the first local broadcast service in Due West, South Carolina.

### III. DISCUSSION

4. *Waiver Request.* Ordinarily, a winning bidder that fails to timely file the required long-form application is deemed to have defaulted, its application is dismissed, and it is subject to the default payment set forth in Section 1.2104(g) of the Rules.<sup>10</sup> However, the Commission may, for good cause, determine that a late filed long-form application should be accepted.<sup>11</sup> When an applicant seeks a waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action.<sup>12</sup> “A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”<sup>13</sup>

5. The Commission has previously granted waivers of the post-auction long-form application filing deadline when minor, inadvertent, post-auction delinquencies did not disrupt the auction process, nor undermine the Commission’s policy of facilitating rapid implementation of service to the

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<sup>6</sup> *Auction of FM Broadcast Construction Permits – 214 Bidders Qualified to Participate in Auction No. 62*, Public Notice, 20 FCC Rcd 19937 (MB/WTB 2005).

<sup>7</sup> *Auction of FM Broadcast Construction Permits Closes – Winning Bidders Announced for Auction No. 62*, Public Notice, 21 FCC Rcd 1071 (MB/WTB 2006) (“*Auction No. 62 Closing Public Notice*”).

<sup>8</sup> *Id.* at 1076.

<sup>9</sup> 47 C.F.R. §§ 73.3573(f)(5)(i), 73.5005(a). These Sections require a winning bidder to file its long-form application within 30 days of the release of the public notice announcing the close of the auction.

<sup>10</sup> 47 C.F.R. § 1.2104(g).

<sup>11</sup> 47 C.F.R. § 73.5005(a).

<sup>12</sup> *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968). In addition, Section 73.3566(a) of the Commission’s radio broadcast rules provides that requests for waiver “shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof.” 47 C.F.R. § 73.3566(a).

<sup>13</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)).

public.<sup>14</sup> We find that Neely has presented sufficient facts that when considered in their totality, demonstrate circumstances that meet the standard for waiver of the application filing deadline. The record indicates that, prior to the late filing of the Form 301 application, Neely had complied with all previous Auction No. 62 requirements, including all filing and payment obligations, and was found to be a qualified bidder. Furthermore, by virtue of his pre-auction upfront payment, Neely had more than adequate funds on deposit with the Commission to satisfy his payment obligation at the time the post-auction down payment was due.<sup>15</sup> While Neely was inattentive to the specific post-auction filing deadline announced in the *Auction No. 62 Closing Public Notice*, we find no evidence of bad faith on his part. Furthermore, in reaching the conclusion to waive the filing deadline, we give considerable weight to Neely's record of prior compliance with auction-related requirements and his prompt action taken to remedy his error, once he became aware of it.

6. We also recognize that the FM licensing process was not significantly delayed nor materially adversely affected by Neely's late filing of the application here. Accepting Neely's Form 301 application would not undermine the Commission's broadcast auction policies. Thus, flexibility is appropriate in this instance. We find it in the public interest to avoid a delay in implementing new service to Due West, South Carolina by having to re-auction the FM construction permit, and therefore grant Neely's waiver request below. Although we grant Neely a waiver of the rules that would otherwise require dismissal of his late filed long-form application and associated imposition of a default payment, we nonetheless find that he apparently failed to comply with the rules requiring timely submission of the post-auction Form 301 application.

7. *Proposed Forfeiture.* In this case, Neely has admitted that he failed to timely file a post-auction Form 301 application, as required by Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules.

8. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.<sup>16</sup> Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.<sup>17</sup> The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,<sup>18</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>19</sup>

9. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$3,000 for the failure to file a required form.<sup>20</sup> In determining the

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<sup>14</sup> See, e.g., *Gulf Coast Community College*, 20 FCC Rcd 17157 (MB 2005); *Silver Palm Communications, Inc.*, 17 FCC Rcd 6606, 6607 (WTB 2002); *City Page & Cellular Services, Inc.*, 17 FCC Rcd 26109, 22611-12 (WTB 2002); *Pinpoint Communications, Inc.*, 14 FCC Rcd 6421 (WTB 1999).

<sup>15</sup> Winning bidders in Auction No. 62 were required to have on deposit, by February 23, 2006, sufficient funds to cover twenty percent of their respective total winning bids. See 47 C.F.R. § 1.2107(b); *Auction No. 62 Closing Public Notice*.

<sup>16</sup> 47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. § 1.80(a)(1).

<sup>17</sup> 47 U.S.C. § 312(f)(1).

<sup>18</sup> See H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982).

<sup>19</sup> See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

<sup>20</sup> See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

appropriate forfeiture amount, we must consider the factors enumerated in Section 503(b)(2)(D) of the Act, including “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”<sup>21</sup>

10. In this case, Neely was on notice that he was responsible for timely submitting his Form 301 post-auction application, but failed to timely file his application. Taking into consideration these facts and the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we propose a forfeiture in the full base amount of \$3,000.

#### IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission’s Rules, that Frank J. Neely is hereby NOTIFIED of his APPARENT LIABILITY FOR FORFEITURE in the amount of \$3,000 for his apparent willful violation of Sections 73.3573(f)(5)(i) and 73.5005(a) of the Commission’s Rules.

12. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission’s Rules, that, within thirty (30) days of the release date of this *NAL*, Frank J. Neely SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

14. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Washington D.C. 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the *NAL*/Acct. No. referenced above.

15. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the respondent’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

16. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.<sup>22</sup>

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<sup>21</sup> 47 U.S.C. § 503(b)(2)(D); *see also Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4).

<sup>22</sup> *See* 47 C.F.R. § 1.1914.

17. IT IS FURTHER ORDERED, that Frank J. Neely's Request for Waiver of the Form 301 Filing Deadline IS GRANTED and the application is accepted for filing.

18. IT IS FURTHER ORDERED, that copies of this *NAL* shall be sent by First Class and Certified Mail, Return Receipt Requested, to Frank J. Neely, P.O. Box 861, Rock Hill, South Carolina 29731 and to his counsel, David Tillotson, Esquire, 4606 Charleston Terrace, NW, Washington, DC 20007-1911.

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg  
Chief, Media Bureau